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No. 82-109

In the Supreme Court of the United States

OCTOBER TERM, 1982

VINCENT ZUCKERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

R. CHRISTOPHER LOCKE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the mailing of invoices for successive orders of merchandise received on credit was sufficiently connected to petitioner's fraudulent scheme to fall within the purview of the mail fraud statute.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 4

Conclusion 7

TABLE OF AUTHORITIES

Cases:

United States v. *Galloway*, 664 F. 2d 161, cert. denied, No. 81-1651 (June 1, 1982) 6

United States v. *Green*, 494 F. 2d 820, cert. denied, 419 U.S. 1004 6

United States v. *Keenan*, 657 F. 2d 41 6

United States v. *Maze*, 414 U.S. 395 ..... 5, 6

United States v. *Sampson*, 371 U.S. 75 6

Statute:

18 U.S.C. 1341 1

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1982. A petition for rehearing was denied on May 26, 1982 (Pet. App. 1b). The petition for a writ of certiorari was filed on July 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on five counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to one year of imprisonment on Count I, to be followed by four years' probation on Counts IV and V. Petitioner was also fined five thousand dollars

and was ordered to pay restitution in the amount of $22,567.00 (Pet. App. 2a, 5a-6a). The court of appeals affirmed (Pet. App. 1a-11a).

1. The evidence presented at trial showed that petitioner utilized numerous businesses operating from three different addresses, as well as various aliases, as part of a scheme to defraud the Zenith Distributing Company of over $22,000 in merchandise (Pet. App. 6a-7a). In June 1977, petitioner leased a storefront in the name of Good Samaritan Hospital Supply Corporation at 9006 Waukegan Avenue, Morton Grove, Illinois. Two months later, using the name "James Breen," petitioner rented a second storefront at 2343 West Irving Park Road, Chicago, Illinois. That location was rented on behalf of the Pahsco Company, with "Breen" posing as the company's vice president. Petitioner thereafter reexecuted the lease in the name of Physicians Supply Company. At about the same time, petitioner applied for a post office box for mail delivered to Good Samaritan Hospital Supply at the Waukegan Road storefront. He then filed a change of address card for the box, listing the Irving Park Road storefront as the business' new address. Petitioner also established a bank account for Good Samaritan Hospital Supply, listing himself and two other persons on the signature card, but giving fictitious addresses for the co-signers. In September 1978, using the name "James Murphy," petitioner rented a third storefront at 6143 Touhy Avenue, Chicago, Illinois, on behalf of Surgical Supply Corporation. He then abandoned the Waukegan Road storefront (Pet. App. 2a-3a).

2. In late August 1978, using the alias "George Weiss," petitioner contacted Zenith Distributing Company on behalf of Good Samaritan Hospital Supply and requested price sheets and information on how he could become a Zenith dealer. Zenith did not require Good Samaritan

Hospital Supply to furnish a financial statement or bank and credit references before opening the account because Zenith's credit manager mistakenly assumed the company was affiliated with the Good Samaritan Hospital (Pet. App. 3a).

On August 30, 1978, "George Weiss" placed an order with Zenith for two color television sets to be shipped to the Waukegan Road storefront. Zenith mailed the billing invoice on September 5, 1978, and received full payment for the order sometime between October 10 and 12,[1] by a check drawn on the account of Good Samaritan Hospital Supply that was signed by "Meyer Kaplan" (Pet. App. 3a-4a).

From September 29 through October 24, 1978, "George Weiss" placed six additional orders with Zenith on behalf of Good Samaritan Hospital Supply. The merchandise was primarily color television sets and videotape recorders, with a total value of $24,012.17. The first two orders were billed and shipped to the Waukegan Road storefront, while the remaining four orders were billed to the vacant Waukegan Road address but shipped to the Irving Park Road storefront. Five invoices were mailed for the six orders, with the fifth invoice combining the last two orders. No payments were made to Zenith on any of these orders (Pet. App. 4a-5a).

3. Zenith became suspicious of the orders from Good Samaritan Hospital Supply when "George Weiss" called on October 24, 1978, to inquire whether any special Christmas prices would be available on videotape recorders. "Weiss" had been very reluctant to leave a return telephone number, and when a Zenith employee tried to call the number that

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[1]Under Zenith's billing procedure, payment for orders billed and shipped through the 25th of each month became due approximately the 10th of the following month (Pet. App. 3a-4a).

"Weiss" had given, there was no answer. An investigator for Zenith was also unable to reach "Weiss" at the given number. That same day, the investigator drove to the Waukegan Road storefront and observed that it was vacant, with no sign posted. The investigator then drove to the Irving Park Road storefront and saw the signs "Physicians Supply Division" and "Doctors Supply Division" posted (Pet. App. 4a-5a).

On October 26, 1978, Zenith investigators conducted a surveillance of the Irving Park Road storefront during the delivery of the most recent order of merchandise to Good Samaritan Hospital Supply. The investigators noted that a cardboard sign reading "Good Samaritan Hospital Supply Corporation," not present two days earlier, was taped to the door of the storefront. After being told by Chicago police officers that petitioner was a "con man" and that they "better get in there before that stuff disappears out the back door," the investigators entered the storefront and repossessed the merchandise they had watched being delivered (Pet. App. 4a-5a).[2]

Petitioner subsequently sold some of the remaining Zenith merchandise at below his cost. In one sale of videocassette recorders, he sent the purchasers invoices stating that they were buying syringes. Petitioner corrected the invoices at the request of the purchasers. He made no payment to Zenith on any of the merchandise received in the last six orders (Pet. App. 5a).

ARGUMENT

Petitioner contends (Pet. 4-11) that the mailings of the invoices were not sufficiently connected to his fraudulent

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[2]After deducting the value of the repossessed merchandise, petitioner owed Zenith $22,567, the amount he was ordered to pay in restitution (Pet. App. 5a-6a).

scheme to fall within the purview of the mail fraud statute. This claim does not warrant review by this Court.

The court of appeals correctly concluded (Pet. App. 8a) that "[t]he mailings in this case were initiated by [petitioner] and were necessary to the successful outcome of his scheme." As the court below explained (*id.* at 8a-9a):

> The mailings were the primary feature of the billing system which [petitioner] sought to take advantage of in order to succeed in his plan to defraud Zenith. * * * [Petitioner's] order triggered the mailings, since he made no request for C.O.D. payment. [Petitioner] knew that a mailed invoice would not be due for at least thirty days, and if the order was properly timed, not until forty five days after the order was placed. The mailings therefore created the time frame for the fraud.
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> * * * * *
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> [T]he mailings were similar to cases where the mailings are used to lull the victim into thinking that conduct which in fact is fraudulent is actually legitimate. [Citations omitted.] The mailings were necessary to provide the time to complete the scheme, that is, for [petitioner] to sell the Zenith merchandise and pocket the proceeds. The mailings therefore were sufficiently connected to the fraudulent scheme to be within the purview of the mail fraud statute.

Petitioner's reliance (Pet. 8-10) on *United States* v. *Maze*, 414 U.S. 395 (1974), is misplaced. In *Maze*, the defendant used a stolen credit card to charge food and lodging at several motels. The use of the mails in that case occurred when the merchants mailed the sales slips reflecting the purchases to the issuing bank, which in turn mailed them to the cardholder. Because the defendant's "scheme reached fruition when he checked out of the motel" (414 U.S. at 402), this Court held that the subsequent mailing of

the invoices was insufficient to support the mail fraud conviction. The Court in *Maze* distinguished *United States* v. *Sampson*, 371 U.S. 75 (1962), where the use of the mails, as in the present case, was "designed to lull the victims into a false sense of security" that they were not being defrauded. *United States* v. *Maze, supra*, 414 U.S. at 403.

For substantially the same reason, petitioner's assertion (Pet. 10-11) that the decision of the court of appeals in this case conflicts with *United States* v. *Keenan*, 657 F. 2d 41 (4th Cir. 1981), and *United States* v. *Green*, 494 F. 2d 820 (5th Cir 1974), cert. denied, 419 U.S. 1004 (1974), is mistaken. In both cases, on facts that bear no similarity to the facts of this case, the courts concluded that the mailing or mailings occurred after the fraudulent schemes at issue had come to fruitition.[3] By contrast, the mailings at issue here were essential to the success of petitioner's scheme. See *United States* v. *Galloway*, 664 F. 2d 161 (7th Cir. 1981), cert. denied; No. 81-1651 (June 1, 1982) (the post-sale mailing of title documents is essential to the continuation of a wholesale dealer's scheme to sell automobiles with altered odometer readings, because retail sales depend on the transfer of title).

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[3] *United States* v. *Keenan, supra*, 657 F. 2d at 42, involved the theft of roof pinning bits by means of a fabricated purchase order. The court concluded that the participants in the scheme achieved their goal at the time of the theft. In the present case, however, petitioner relied on the delay occasioned by the mailing of the five invoices to obtain repeated deliveries of merchandise from Zenith. *United States* v. *Green, supra*, 494 F. 2d at 824-825, also relied upon by petitioner, involved the identical scheme at issue in *United States* v. *Maze, supra*. For the reasons stated above, this decision does not conflict with the holding of the Seventh Circuit in this case, where petitioner's reliance on mailed invoices lulled his victim "into a false sense of security." *United States* v. *Maze*, 414 U.S. at 403.

Petitioner raises no novel issue of law, but merely questions the application of settled precedent to the discrete facts of this case. The court of appeals correctly concluded that petitioner's reliance upon mailed invoices, rather than C.O.D. payments, enabled him to place successive orders with Zenith, lulling the company into a continued extension of credit. The mailings, in short, were vital to the continuation of petitioner's scheme to defraud. On this basis, the mailings were sufficiently connected to the scheme to bring petitioner's conduct within the purview of the mail fraud statute.[4] This fact-bound conclusion is consistent with the decisions of this Court, and does not conflict with the holding of any other court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

R. CHRISTOPHER LOCKE
Attorney

SEPTEMBER 1982

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[4]Contrary's to petitioner's claim (Pet. 5-8), the court of appeals' holding in this case will not "turn[] the federal government into a collection agency without parallel for unsatisfied creditors." The holding is carefully limited to situations where use of the United States mail furthers the continuation of a scheme to defraud by preventing the victim from apprehending the nature of the scheme.

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